Supreme Court, U.S.
FILED

941457 MAR 2 1995

OFFICE OF THE CLERK

No.

In The

# Supreme Court of the United States

October Term, 1994

DECELL & ASSOCIATES, INC.,

*Petitioner,*

*vs.*

FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR WRIT OF CERTIORARI

MADISON R. JONES
*Counsel of Record*
ENGEL, JONES, P.C.
*Attorneys for Petitioner*
Three Riverway, Suite 1500
Houston, Texas 77056
(713) 965-0404

## QUESTIONS PRESENTED

1. Where a depositor has sued a bank in state court for its deposit, and the suit is pending when the bank fails, and Federal Deposit Insurance Corporation is appointed receiver of the failed bank, and FDIC has intervened in the pending suit, has the depositor's right to procedural Due Process of Law granted by the Fifth Amendment been denied by requiring the depositor to file a different and distinct proof of claim with FDIC, other than the pending suit, in order claim depositor insurance?

2. Is it a denial of procedural Due Process of the Law, under the facts of this case, to deem that the Federal Deposit Corporation, though one body, can know certain facts when acting as Receiver, but be considered to not know

the same facts when acting in its Corporate capacity? Stated another way, is it a denial of procedural due process under the facts of the case to permit a case to be removed by FDIC under a claim of right pursuant to 12 USC §1819(b)(2)(B), and then deny that FDIC had any knowledge of the existing suit for purposes of notice of the claims in the suit?

3. Where a suit is pending in state court between a depositor and a bank when the bank fails, and Federal Deposit Insurance Corporation is appointed receiver of the failed bank, and FDIC has intervened in the suit in place of the failed bank, does the district court have jurisdiction to hear the removed state court case in those instances where the depositor has initiated the suit on its

deposit, and FDIC has removed the suit under a claim of right pursuant to 12 USC §1819(b)(2)(B)?

4. Where FDIC has intervened in a pending state court case concerning a failed state bank, has FDIC waived its right to insist upon an administrative claims process by an insured depositor of the failed bank, rather than the pending litigation, by failure to comply with the mandates of Rule 9(a), Fed.R.Civ.P.?

## LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

DECELL & ASSOCIATES, INC.

Respondent:

FEDERAL DEPOSIT INSURANCE CORPORATION

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| List of Parties | iv |
| Table of Contents | v |
| Table of Citations | vi |
| Opinion Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitutional Provisions and Statutes | 3 |
| Statement of the Case | 7 |
| A. Procedural History | 7 |
| B. Statement of Facts | 10 |
| Reasons for Granting the Writ | 14 |
| The decisions of the district court and the Fifth Circuit conflict with the decisisions of the Supreme Court and statutory law: *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) requires that litigants are entitled to an opportunity to be heard "appropriate to the nature of the case;" as 12 U.S.C. § 1819, *et seq.* has been applied to Petitioner under the facts of this case, Petitioner has been denied its right to an appropriate hearing, and procedural Due Process of Law. | 14 |
| Conclusion | 31 |

*Page*

## TABLE OF CITATIONS

**Cases Cited:**

*Buzzini Drilling Co. v. Fuselier*, 562 S.W. 2d 878 (Tex. Civ. App. - Houston [1st] 1978, no writ history) ..... 23

*Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*, 489 U.S. 561, 109 S. Ct. 1361, 103 L. Ed. 2d 602 (1989) ..... 27

*DeCell & Associates v. F.D.I.C.*, 36 F.3d 464 (5th Cir. 1994) ..... 1

*Lynn County School Board v. Garlynn Common County Line School District*, 118 S.W. 2d 1070 (Tex. Civ. App. - Amarillo 1938, writ ref'd) ..... 23

*Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) ..... 14, 18

*North Mississippi Savings & Loan Assn. v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S. Ct. 790, 88 L. Ed. 2d 768 (1986) ..... 28, 29

*Philadelphia Gear Corporation v. Federal Deposit Insurance Corporation*, 751 F.2d 1131 (10th Cir. 1984), *rev'd sub nom. Federal Deposit Insurance Corporation v. Philadelphia Gear Corporation*, 476 U.S. 426, 106 S. Ct. 1931, 90 L. Ed. 428 (1986) ..... 26

*Stevens v. Humble Oil & Refining Company*, 346 F.2d 43 (5th Cir. 1965) ..... 24

*Contents*

*Page*

**Statutes Cited:**

12 U.S.C. § 1464(d)(1) ..... 29

12 U.S.C. § 1729(b) ..... 29

12 U.S.C. § 1811 ..... 3, 4

12 U.S.C. § 1819, *et seq.* ..... 14

12 U.S.C. § 1819(b) ..... 17, 18

12 U.S.C. § 1819(b)(2)(B) ..... ii, iii, 2, 4

12 U.S.C. § 1819(b)(2)(D) ..... 4, 5

12 U.S.C. § 1819(d) ..... 32

12 U.S.C. § 1821 ..... 7, 8

12 U.S.C. § 1821(c) ..... 22

12 U.S.C. § 1821(f) ..... 19, 30

12 U.S.C. § 1821(f)(1) ..... 5

12 U.S.C. § 1821(g)(4) ..... 22

28 U.S.C. § 1291 ..... 2

*Contents*

*Page*

**United States Constitution Cited:**

Fifth Amendment ..... i, 3, 15, 16

**Rules Cited:**

Fed. R. App. P. 3(a) ..... 2

Fed. R. Civ. P. 9(a) ..... iii, 5, 6, 25, 32

Fed. R. Civ. P. 12 ..... 21

Fed. R. Civ. P. 12(h) ..... 21

Fed. R. Civ. P. 12(h)(1) ..... 6

Tex. R. Civ. P. 93 ..... 23, 25

Tex. R. Civ. P. 120a ..... 24, 25

**APPENDIX**

Appendix A — Fifth Circuit Opinion ..... 1a

Appendix B — Fifth Circuit Order ..... 40a

Appendix C — District Court Order ..... 42a

## OPINION BELOW

The decision and final judgment of the United States District Court for the Southern District of Texas, dismissing Petitioner's case for lack of subject matter jurisdiction is unreported. (App.A, 1a-39a).

The decision and final judgment of the Court of Appeal for the Fifth Circuit, affirming the district court's decision, is reported. DeCell & Associates v. F.D.I.C., 36 F.3d 464 (5th Cir. 1994). (App. B, 40a-41a).

The order denying Petitioner's motion for rehearing is unreported. (App. C, 42a-49a).

## STATEMENT OF JURISDICTION

Petitioner brought this case in the District Court for Harris County, Texas,

alleging that Petitioner had been damaged by the failure of Guaranty Bank, a Texas state bank, to honor a letter of creditor. After Guaranty Bank failed, FDIC was appointed receiver, and removed the case to the District Court for the Southern District of Texas under authority of 12 USC §1819(b)(2)(B). The district court entered a final judgment dismissing the case for lack of subject matter jurisdiction on January 4, 1994. Petitioner filed a timely notice of appeal to the Court of Appeals for the Fifth Circuit on March 2, 1994. Petitioner, in his brief, alleged jurisdiction under 28 USC §1291 and FRAP 3(a).

The Court of Appeals filed a decision affirming the district court on November 1, 1994. Petitioner filed a timely motion

for rehearing on November 14, 1994. The Court of Appeals denied the motion for rehearing on December 2, 1994. (App. A, 1a). Petition has filed this Petition for Writ of Certiorari within 90 days of December 2, 1994, which will occur on March 2, 1995.

**CONSTITUTIONAL PROVISIONS AND STATUTES**

Amendment V to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12 USC §1811 provides in pertinent part:

> There is created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation")

> which shall insure, as hereinafter provided, the deposits of all banks . . .

12 USC §1819(b)(2)(B) provides:

> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation of the Corporation is substituted as a party.

12 USC §1819(b)(2)(D) provides in pertinent part:

> . . . any action (1) to which the

> Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff . . . shall not be deemed to arise under the laws of the United States.

12 USC §1821(f)(1) provides in pertinent part:

> In case of the liquidation of, or other closing or winding up of the affairs of, any insured depository institution, payment of the insured deposits in such institution shall be made by the Corporation as soon as possible.

28 USC, Rule 9(a), Fed.R.Civ.P. provides:

> When a party desires to raise an

> issue as to the legal existence of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

28 USC, Rule 12(h)(1), Fed.R.Civ.P. provides in part:

> A defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

## STATEMENT OF THE CASE

### A. Procedural History

Petitioner commenced a suit in state court against Guaranty Bank, a Texas state bank, and others, claiming that Guaranty had improperly denied Petitioner the right to draw upon a letter of credit, and that Petitioner had suffered monetary damages. Guaranty made no claim for affirmative relief against any party to the suit, and merely filed a general denial. After the suit had been pending for some time, but before trial, Guaranty Bank failed. The Texas Banking Commissioner appointed FDIC receiver of the failed bank. Later, FDIC intervened in the suit, and removed the case to district court pursuant to a federal law which permits "the Corporation" to do so. The statute, 12

USC §1821, has a proviso which states that when FDIC is acting solely as receiver of a state bank which is not a plaintiff, it may not remove the case.

Almost two years after removal, FDIC sought and was granted permission to amend its pleading to assert that Petitioner was not entitled to recover anything from FDIC other that as a pro rata unsecured creditor. The case was tried to a magistrate judge. After trial, the magistrate judge sua sponte granted a new trial, reasoning that FDIC was not present in its corporate capacity. FDIC-Corporate entered an appearance after service of process, but did not consent to trial by the magistrate judge. The District Court invited all remaining parties to file motions for summary judgment, which they

did. The District Court determined it had no jurisdiction to decide the case against FDIC, since Petitioner had not filed a formal proof of claim with FDIC pertaining to the failed bank, and dismissed Petitioner's case against FDIC.

Petitioner appealed to the Court of Appeals for the Fifth Circuit, which rejected all of Petitioner's arguments, including those that FDIC had already appeared in the case voluntarily, that FDIC knew of the claim which Petitioner had made against the failed bank by virtue of FDIC's insertion of itself as successor to the bank so that no further administrative claim was necessary, that the requirement of adherence to non-existent regulations concerning administrative procedure amounted to a

denial of procedural due process, and that the pending suit amounted to an informal proof of claim. The Fifth Circuit affirmed the decision of the district court.

**Statement of facts**

Prior to June 3, 1988, Guaranty was a state chartered bank located in Dallas, Texas. On June 3, 1988, the board of directors of Guaranty voted to close the bank, and tendered the bank to the Banking Commissioner of Texas for liquidation. On June 3, 1988, the Banking Commissioner of Texas appointed the Federal Deposit Insurance Corporation receiver of Guaranty.

On March 24, 1986, Guaranty issued an Irrevocable Letter of Credit No. 719 in the sum of $250,000.00 on the account of

Perforaciones Marinas Del Golfo, S.A. in favor of JRL, a Texas corporation. The letter of credit incorporated the terms of the Uniform Customs and Practices for Documentary Credits. Petitioner presented the letter of credit, and other documentation which Petitioner considered in compliance with the letter to Guaranty, which refused to honor the letter of credit. Guaranty extended the expiration of the letter of credit from June 15, 1986, to July 15, 1986, but Petitioner made no further presentation to Guaranty.

Petitioner contended that the failure of Guaranty to honor the letter of credit, as presented by Petitioner, was wrongful. Once Guaranty failed and FDIC came into the case, Petitioner contended that it enjoyed the status of an insured

depositor, and that it was entitled to $100,000 of insurance as such, and attorney fees.

The case was tried to the United States Magistrate Judge, who later granted a new trial on her own motion, holding that Petitioner had failed to join FDIC in its corporate capacity, and, thus, a necessary party was missing from the case. The court directed Petitioner to join FDIC in its corporate capacity.

Later, Petitioner formally joined FDIC-Corporate. Petitioner contended that FDIC-Corporate had been part of the case since its inception, though FDIC disagreed. Petitioner did not file any proof of claim with FDIC at any time, contending that its suit against Guaranty was an informal proof of claim, and that

FDIC had waived its right to insist on the filing of a claim by its conduct. At the invitation of the Court, the both Petitioner and FDIC filed motions for summary judgment. In addition to its other claims, FDIC contended that the District Court had no jurisdiction to hear the case because of Petitioner's failure to file a proof of claim. The motions filed by Petitioner and FDIC were submitted to the Court for decision without a hearing.

The District Court denied Petitioner's motion for summary judgment, and dismissed Petitioner's complaint against FDIC for lack of jurisdiction because of its failure to file a proof of claim. Petitioner appeals that decision. In addition, the Court granted Petitioner

a judgment against JRL International and Associates, which had been agreed to by those parties. There is no appeal from that portion of the judgment.

**REASONS FOR GRANTING THE WRIT**

THE DECISIONS OF THE DISTRICT COURT AND THE FIFTH CIRCUIT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AND STATUTORY LAW: MULLANE v. CENTRAL HANOVER BANK AND TRUST CO., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) REQUIRES THAT LITIGANTS ARE ENTITLED TO AN OPPORTUNITY TO BE HEARD "APPROPRIATE TO THE NATURE OF THE CASE;" AS 12 USC §1819 et seq. HAS BEEN APPLIED TO PETITIONER UNDER THE FACTS OF THIS CASE, PETITIONER HAS BEEN DENIED ITS RIGHT TO AN APPROPRIATE HEARING, AND PROCEDURAL

DUE PROCESS OF LAW.

This case presents a clear opportunity to discuss the due process application of having FDIC employ the informal adjudicatory process which it is authorized, but not required under Title 12, to use in such a way as to strip the rights of litigants who have already filed suit to utilize the courts, and put them into an administrative procedure without written regulations. It also presents an opportunity to discuss the dual function of FDIC, that of acting as a receiver and in its corporate capacity as insurer of bank deposits. The question presented for review on the FDIC claims process is one of first impression.

Petitioner claims that its procedural due process rights under the Fifth

Amendment have been violated by the district court's requirement that Petitioner abandon its pending suit against a failed bank, and file an administrative claim with FDIC before claiming insurance proceeds as a depositor in any pending litigation. Petitioner does not contend that there are not instances where the administrative process is proper. However, Petitioner does contend that since the administrative process is not mandatory, and that since FDIC voluntarily chose to enter the arena, it has waived its right to utilize the administrative claims process and cannot now insist that Petitioner abandon its suit and submit its administrate claim.

In order for FDIC to remove any case in which the failed state bank is a party

in state court litigation, FDIC must act in its corporate capacity. FDIC's right to remove a state court case involving a state chartered bank comes from 12 USC §1819(b), which provides that "the Corporation" is deemed to be an agency of the United States, and may remove any action pending in which "the Corporation" is a receiver, except in those instances where capacity of receiver arose "by the exclusive appointment by State authorities" and the receiver is not a plaintiff. FDIC was appointed by the Texas Banking Commissioner. Guaranty was a Texas state bank. Guaranty was a defendant in the state court suit in which Petitioner was the plaintiff. Neither the bank nor FDIC made claims for relief other than to be relieved of the duties

Petitioner sought to impose. By process of elimination, then, the only way FDIC could remove was if it acted in its corporate capacity at the time of the removal, since FDIC-Receiver has no right to remove on the statute it claimed it was invoking, 12 USC §11819(b).

Mullane v. Central Hanover Bank And Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), though factually different from this case, stands for the proposition that one cannot be deprived of his property without an appropriate hearing. There, a New York law provided that banks could publish a notice in the local newspaper that a hearing would be held in a court, settling once and for all, the account of such bank as to certain named trust funds, and that

persons interested in such funds would be bound by such accounting once a decree of the court issued. There was no provision for the giving of personal service to the parties, even though their number included non-residents of New York whose addresses were known, and others whose addresses were unknown. This Court held that the appointment of a special guardian and attorney for the unknown beneficiaries was permissible, but that procedural due process was violated if a realistic opportunity to be heard was denied.

The payment of insured deposits of failed banks is governed by 12 USC §1821(f), which provides that "the Corporation" (meaning FDIC) is to pay cash to the insured depositor. Subsection (2) provides that FDIC "in its discretion, **may**

**require** proof of claim to be filed and **may approve or reject** such claims for insured deposits." There is nothing mandatory about the filing of claims or the approval or rejection of the claim process. Subsection (3) states that FDIC **may** resolve claims, and **may** require the determination of a court of competent jurisdiction if regulations are not prescribed (which they are not). (Emphasis is the author's.) Nothing is mandatory or exclusive in the act. Certainly, if FDIC **may** require the determination of a court of competent jurisdiction, and it files an intervention in a case where a case is pending on a depositor's claim against an insured bank, the permissive language of the statute permits, not prohibits, the court's

exercise of its jurisdiction.

The issue of waiver is addressed in Rule 12, Fed.R.Civ.P., which states that jurisdiction or venue objections may be made by motion or answer. Petitioner concedes, as it must, that lack of jurisdiction in the court may be raised at any time. Assuming for the argument, however, that the district court has jurisdiction to hear cases such as Petitioner's claim for insured funds, a defense that another forum might be more appropriate, or that an indispensable party is not present, may be waived by the entity entitled to assert it. Rule 12(h), Fed.R.Civ.P.

FDIC and Petitioner differ on what constitutes an appropriate hearing. Here, Petitioner had chosen the forum and had

already presented notice to Guaranty Bank that Petitioner claimed damages resulting from Guaranty's allegedly improper refusal to honor a letter of credit. Knowing of the suit, FDIC intervened in the suit, thereby waiving FDIC's right to insist on Petitioner's administrative claim.

Petitioner's contentions are based upon its assertion that FDIC, in both its corporate and receiver capacities, has been involved in this case since FDIC's intervention. Though the district court rejected this contention, Petitioner contends its position is supported by both the law and the facts.

State bank receiverships are permitted by 12 USC §1821(c); 12 USC 1821(g)(4) states that the rights of depositors and creditors are determined by

state law. By process of reasoning, if FDIC may intervene in state court suits, and participate in such suits (even if only for a short time, as here) FDIC subjects itself to the Texas concept of appearance is that an intervenor takes a case as he finds it. Buzzini Drilling Co. V. Fuselier, 562 SW2d 878 (Tex.Civ.App.-Houston [1st] 1978, no writ history). Lynn County School Board V. Garlynn Common County Line School District, 118 SW2d 1070 (Tex.Civ.App.-Amarillo 1938, writ ref'd.) Texas procedure requires that one asserting a lack of capacity to be sued must allege that, and verify its answer. Rule 93, Tex.R.Civ.P. Texas procedural rules provide that one who intends to specially appear to contest the court's jurisdiction must do so by sworn motion,

or else the appearance is a general one. Rule 120a, Tex.R.Civ.P. In this case, FDIC did not file any sworn motion or file a pleading in the state court objecting to the jurisdiction of the court over the subject matter of the suit, and, therefore, has waived its right to contest it. The concept of taking one's case as one finds it has been recognized in the Fifth Circuit as well in Stevens v. Humble Oil & Refining Company, 346 F.2d 43 (5th Cir. 1965).

When FDIC intervened in the state court suit, its appearance was a general one, since it did not limit its appearance. While Petitioner recognizes that FDIC may act in the capacity of a receiver only, or in its corporate capacity only, there is but one Federal

Deposit Insurance Corporation. The Corporation appeared, and while it stated it was the receiver of Guaranty Bank, it did not specifically limit its appearance to that of being a receiver. A fair reading of Rules 93 and 120a TRCP (which applied to FDIC when it intervened) required that it must file a verified pleading, limiting its appearance. It did not do so, and therefore waived its right to claim for the first time, 22 months after removal, that it appeared in a limited capacity.

Federal rules provide that one's lack of authority to sue must be raised by specific negative averment, or it is waived. Rule 9(a), Fed.R.Civ.P.

When FDIC intervened in the Guaranty lawsuit, it found a suit by Petitioner

against FDIC on a secured letter of credit. Because the bank had failed, the suit was, by necessity, a claim by Petitioner for insurance proceeds as a depositor. Philadelphia Gear Corporation v. Federal Deposit Insurance Corporation, 751 F.2d 1131 (10th Cir. 1984), rev'd sub nom. Federal Deposit Insurance Corporation v. Philadelphia Gear Corporation, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed. 428 (1986), held that holders of letters of credit on failed banks were insured depositors. Although the Circuit opinion was reversed by the Supreme Court, which found that the letter of credit was unsecured, and that holders of **unsecured** letters of credit were not depositors, one cannot read the opinions without coming to the conclusion that the result would have been much

different had the failed bank held security for the letter of credit.

Petitioner likens the admitted lack of FDIC regulations for approving and disapproving claims, were they to be presented, to the situation the United States Supreme Court expressly disapproved in Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation, 489 US 561, 109 S.Ct 1361, 103 L.Ed.2d 602 (1989). There, FSLIC was appointed receiver of an insolvent bank during the pendency of a suit against the bank. Coit, a borrower of the bank, had sued the bank in the state court in Dallas, Texas, for usury stemming from the bank's requirement of a "profit participation" as a condition to granting a loan. Coit did file a claim with FSLIC

on the last possible day for doing so, but FSLIC failed to reach a decision, declaring after 6 months of review that it needed to retain the claim in its administrative process "for further review." In the meantime, the District Court had dismissed Coit's suit in which FSLIC had intervened for lack of subject matter jurisdiction, because of the holding in North Mississippi Savings & Loan Assn. v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985) cert. denied, 474 US 1054, 106 S.Ct 790, 88 L.Ed.2d 768 (1986). Hudspeth rested on the Fifth Circuit's holding that such a suit would "restrain or affect the exercise of the powers" of a receiver, which had the right to have claims submitted to it for administrative determination prior to the filing of a

suit. Justice O'Connor, in the Coit majority opinion, rejected FSLIC's claim that one must exhaust the administrative claims procedure set forth in 12 USC §1729(b). After discussing the regulations which FSLIC had established pursuant to 12 USC §1464(d)(1), and the subsequent revision to the rules after Hudspeth (which provide for notification to all potential claimants of the right to present a claim by the bar date [there is no suggestion that Petitioner was afforded such a notice]), the Court concluded the established FSLIC procedures provided nothing but a "'black hole' from which it may not emerge before the statute of limitations on Coit's state law claims has run. Administrative remedies that are inadequate need not be exhausted." 489 US

at pp. 586-87.

Petitioner respectfully suggests that FDIC's administrative procedure authority granted by 12 USC §1821(f) is a black hole of proportions equal to or exceeding that of FSLIC's. The wording and intent appear similar. To require the formal submission of Petitioner's claim to FDIC's administrative process, which FDIC admits has no regulations, as a prerequisite to maintaining Petitioner's preexisting suit would amount to an unconstitutional denial of due process and a taking of private property for public use without just compensation.

Petitioner recognizes the well established rule of law that the parties cannot consent to jurisdiction when none exists. This, however, is not an instance

where no jurisdiction exists over the parties or subject matter; rather, the district court held that because FDIC did not waive its right to insist upon the administrative claims process, the district court had not jurisdiction to hear the case until the process had been satisfied. Under the facts of the case, Petitioner respectfully suggests that such a holding is a violation of his right to procedural due process. FDIC has joined the fray and cannot now insist that Petitioner must withdraw.

## CONCLUSION

The determination by the district court, and the Fifth Circuit's affirmance of the decision, that there is no jurisdiction in the courts for Petitioner's suit until the claim has been

through FDIC's administrative process conflicts with Petitioner's right to procedural due process and the purpose of 12 USC §1819(d) and Rule 9(a), Fed.R.Civ.P. This Court should grant certiorari to discuss this important question.

Respectfully submitted,

MADISON R. JONES
Counsel of Record
ENGEL, JONES PC
Three Riverway, Suite 1500
Houston, Texas 77056
(713)965-0404

**APPENDIX A -FIFTH CIRCUIT OPINION**

DECELL & ASSOCIATES, INC.

Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Guaranty Bank, et al., Defendants, Federal Deposit Insurance Corporation, as Receiver for Guaranty Bank, Defendant-Appellee.

No. 94-20165

Summary Calendar.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

Nov. 1, 1994.

Rehearing denied Dec. 2, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before King, Jolly and DeMoss, Circuit Judges.

PER CURIAM:

Appellant DeCell & Associates ("DeCell") appeals from the district court's dismissal of its claims against the Federal Deposit Insurance Corporation ("FDIC"), in both its receivership and corporate capacities, for lack of subject matter jurisdiction. We affirm the judgment of the district court.

## I. BACKGROUND

DeCell is a company engaged in the business of buying and selling oilfield drill pipe and related products. In April 1986, JRL International and Associates, Inc. ("JRL") ordered drill collar bits from DeCell, instructing DeCell to ship the bits to a Mexican company, Perforaciones Marinas Del Golfo, S.A. ("Permargo"). Before it would sell to JRL, DeCell required a letter of credit;

consequently, Guaranty Bank ("Guaranty":) issued a $250,000 irrevocable letter of credit on the account of Permargo and in favor of JRL. JRL allegedly transferred the letter of credit to assignee DeCell, and upon receipt of the letter of credit, DeCell shipped the drill collar bits to Permargo.

On June 9, 1986, DeCell presented the letter of credit to Guaranty for payment, but Guaranty refused to honor it. On August 13, 1986, DeCell filed suit in state court against Guaranty and JRL for the alleged wrongful dishonor of the letter of credit. While the case was pending in state court, Guaranty failed, and the Banking Commissioner of Texas appointed the FDIC as Receiver ("FDIC--Receiver") on June 3, 1988. FDIC-Receiver intervened as defendant in place

of Guaranty, and removed the case to federal district court pursuant to 12 U.S.C. §1819(b)(2)(B).[1]

In its amended answer, FDIC-Receiver raised two affirmative defenses that were uniquely applicable to the agency. First, FDIC-Receiver asserted that the federal court lacked jurisdiction to determine whether the letter of credit was an "insured deposit."[2] Second, FDIC--Receiver

[1] The statute provides in relevant part:

> Except as provided in subparagraph (d), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party. 12 U.S.C. §1819(b)(2)(B).

[2] DeCell claimed that its letter of credit was an insured deposit, and as a consequence, (Cont'd)

argued that DeCell had failed to sue the correct party--the FDIC in its corporate capacity ("FDIC--Corporate")--which alone is authorized under 12 U.S.C. §1821(f)(1)[3] to pay insured deposits upon the closing of an insured depository institution. On February 7, 1992, DeCell and JRL filed a stipulation for entry of judgment against JRL in favor of DeCell; thus, only the remaining wrongful dishonor action against FDIC--Receiver

(Cont'd)
DeCell asserted that it could recover $1000,000 of deposit insurance rather than a simple pro rata share of the receivership estate.

[3] The statute provides in relevant part:

> In case of the liquidation of, or other closing or winding up of the affairs of, any insured depository institution, payment of the insured deposits in such institution shall be made by the Corporation as soon as possible. 12 U.S.C. §1821(f)(1).

(substituting for Guaranty) proceeded to a bench trial before a United States Magistrate.

Without issuing a judgment, the Magistrate sua sponte ordered a new trial because she determined that FDIC--Corporate was an indispensable party to DeCell's claim for deposit insurance. The Magistrate also ruled that the district court had subject matter jurisdiction to determine whether the letter of credit is an insured deposit. FDIC--Receiver filed a motion for reconsideration, urging that, by statute, no court has jurisdiction over the deposit insurance claim until DeCell files the claim with FDIC--Corporate and FDIC--Corporate makes a "final determination." It is undisputed that DeCell never filed such a claim with

FDIC--Corporate.[4] The Magistrate denied the motion for reconsideration and set the case for a new trial.

FDIC--Receiver then filed a second supplemental motion for reconsideration, reiterating its jurisdictional challenges. FDIC--Corporate, having been added as a party by DeCell, moved to dismiss on the same jurisdictional grounds, and withdrew its consent to proceed before the Magistrate. The district court then ordered the parties to file cross-motions for summary judgment on the issues in the case.

In a January 4, 1994 order, the district court dismissed DeCell's claims against both FDIC--Receiver and FDIC--

---

[4] DeCell admits in the "Statement of facts" portion of its brief that "DeCell did not file any proof of claim with FDIC at any time.

Corporate for lack of jurisdiction. As the district court wrote:

> In carefully reviewing the entire record, the Court recognized that something went awry in the rulings in this dispute, perhaps because in its early stages the applicable law was new, untested, and indeed, still developing. Nevertheless it is now clear to the Court that under the applicable law, cited by the FDIC in both its receivership and corporate capacities, that [sic] DeCell is required to file a claim with the federal agency and that this Court has no jurisdiction to consider the dispute.

DeCell appeals from this ruling.

## II. STANDARD OF REVIEW

Subject matter jurisdiction is a question of law that we review on a de novo basis. See Carney v. Resolution Trust Corp., 19 F.3d 950, 954 (5th Cir.1994) (per curiam); Ceres Gulf v. Cooper, 957 F.2d 1199, 1204 (5th Cir.1992). The question of federal court jurisdiction "may be raised by parties, or by the court sua sponte at any time." MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 173 (5th Cir.1990).

## III. ANALYSIS AND DISCUSSION

Many of DeCell's contentions can be resolved merely by examining the deposit insurance system and our holdings in the area. Because this case hinges on our interpretation of the statutory provisions, a thorough description of the statutory scheme is necessary. DeCell's

arguments will then be discussed in turn.

A. The Exhaustion Requirement

Federal statutes govern the process by which the FDIC designates claims entitled to federal deposit insurance. See 12 U.S.C. §1821(f). This "designation" responsibility is statutorily given to FDIC–Corporate, as that entity is charged with insuring the deposits of banking institutions and processing the insurance claims of failed banks. See 12 U.S.C. §1821(sa), (f). The relevant sections on the payment of insured deposits provide:

> (f) Payment of insured deposits
>
> . . . . .
>
> (2) Proof of claims
>
> The Corporation, in its discretion, may require proof of claims to be filed and may approve or reject such claims for insured deposits.

(3) Resolution of disputes

(A) Resolutions in accordance to corporation regulations

In the case of any disputed claim relating to any insured deposit or any determination of insurance coverage with respect to any deposit, the Corporation may resolve such disputed claim in accordance with regulations prescribed by the Corporation establishing procedures for resolving such claims.

(B) Adjudication of claims

If the Corporation has not prescribed regulations establishing procedures for resolving disputed claims, the Corporation may require the final determination of a court of competent jurisdiction before paying any such claim.

(4) Review of corporation's determination

> Final determination made by the Corporation shall be reviewable in accordance with chapter 7 of Title 5 by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the principal place of business of the depository institution is located.

12 U.S.C. §1821(f).

Based on this statutory scheme, the FDIC contends that a deposit insurance claim is not ripe for federal court review until the claim has been presented to FDIC-Corporate, and until FDIC-Corporate has made a "final determination." In contrast, DeCell emphasized the tentative "may" language

of subsections (2) and (3), asserting that "[t]here is nothing mandatory about the filing of claims or the approval or rejection of the claim(s) process."

DeCell's interpretation, however, has previously been rejected by this Court. In Aztec General Agency v. Federal Deposit Insurance Corp. No. 93-1424, 1994 WL 57253, slip op. at 3 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion), plaintiff Aztec filed suit against a failed bank and FDIC--Corporate in state court for wrongful dishonor of a letter of credit. FDIC--Receiver substituted itself in place of the failed bank, and the lawsuit was removed to federal court. See id. On appeal, FDIC-Corporate argued that the district court lacked subject matter jurisdiction to hear disputes concerning FDIC--Corporate's final

determination of "insured deposit" status. See if. at 4.

This Court agreed with the position of the FDIC, concluding that the district court lacked jurisdiction over the insured deposit dispute. See id at 6. As we explained:

> [W]e note that Aztec acknowledges that FDIC--Corporate has not made a final determination in this case. In fact, although Aztec wrote a letter to FDIC--Receiver seeking payment of the letter of credit, Aztec never submitted a claim to FDIC-Corporate for payment of an insured deposit. Because Aztec never sought payment of an insured deposit from FDIC--Corporate, it is not surprising that FDIC--Corporate never made a final determination

> denying payment. Thus, without a final determination from FDIC--Corporate denying payment of the alleged insured deposit, this case is not, in any event, ripe for judicial review.

Id. at 6-7 (footnote omitted) (emphasis added). Thus, just as we have found an exhaustion requirement in the §1821(d) procedures for presenting creditors' claims to FDIC--Receiver, see Meliezer v. Resolution Trust Co., 952 F.2d 879, 881-82 (5th Cir. 1992) (stating that creditors of a failed institution must first present their claims to the Receiver for administrative consideration before pursuing a judicial remedy), so too have we established an exhaustion requirement in the §1821(f) procedures for presenting deposit insurance claims to FDIC--Corporate.

In the instant case, it is undisputed that DeCell has never presented its deposit insurance claim to FDIC--Corporate. As a consequence, there has been no opportunity for FDIC--Corporate to make a "final determination" regarding whether DeCell's letter of credit was an insured deposit. Thus, following from our decision in Aztec, DeCell's claims against FDIC--Receiver and FDIC--Corporate are not ripe for judicial review, and the district court correctly dismissed the claims for lack of subject matter jurisdiction.

Even if FDIC—Corporate had made a "final determination," we nevertheless would affirm the district court's dismissal for lack of jurisdiction. Our cases have repeatedly held that under §1821(f)(4), an appeal of FDIC--

Corporate's "final determination" concerning payment of insured deposits can only be made to the appropriate circuit court of appeals. See Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 7(5th Cir.Feb. 7, 1994) (per curiam)(unpublished opinion); Kershaw v. Resolution Trust Corp., 987 F.2d 1206, 1208 (5th Cir.1993) (per curiam); Nimon v. Resolution Trust Corp., 975 F.2d 240, 243-44 (5th Cir.1992) ("Congress used plain language in 12 U.S.C. §1821(f)(4) which specifies that the courts of appeal will be the fora of these [deposit insurance coverage] reviews"). Thus, even if we assume that DeCell did present its claim to FDIC--Corporate and that FDIC--Corporate had made a "final determination," the district court still lacked jurisdiction under the

plain language of §1821(f)(4) and the mandate of our prior opinions.

B. Waiver of the Exhaustion Requirement

DeCell begins its brief by suggesting, through a number of arguments, that FDIC--Corporate waived its right to rely upon DeCell's failure to file a deposit insurance claim. To support this contention, DeCell argues that the FDIC, in both its corporate and receivership capacities, has been involved in the case since FDIC--Receiver's intervention. DeCell seems to assert that because FDIC--Receiver intervened in the state court lawsuit without expressly limiting its appearance to that of Receiver, the FDIC waived its right to claim that FDIC--Corporate was not presented with, and was unaware of, the deposit insurance

claim.[5] As DeCell itself summarized:

> Because of FDIC's knowledge of the state court suit, and because of its participation in the case for 22 months without a Rule 12 motion, plea in abatement, answer alleging estoppel for failure to participate in the claims process or other indication that DeCell should seek administrative remedies, it has waived any right to complain about DeCell's lack of filing for determination of insured depositor status th(r)ough the administrative process.

DeCell's waiver arguments are without

---

[5] Similarly, DeCell seems to contend that the FDIC waived its right to argue that it appeared in the limited capacity of Receiver because the FDIC did not specifically raise a lack of capacity defense when it intervened in the lawsuit.

merit. First, DeCell's contention that the FDIC's intervention was a "general appearance" because it did not expressly limit its appearance to that of Receiver is misguided. It is well-settled that the FDIC operates in two separate and legally distinct capacities, each with very different responsibilities. See Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 2 n. 1 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion) ("FDIC--Receiver and FDIC--Corporate are distinct legal entities"); Texas Am. Bancshares, Inc. v. Clarke, 954 F.2d 329, 335 (5th Cir.1992) ("The separateness of these dual identities of the FDIC has been well respected by federal courts."); Federal Deposit Ins. Corp. v. Condit, 861 F.2d 853, 854, 858 (5th Cir.1988). FDIC--

Receiver is charged with the responsibility of winding up the affairs of failed institutions, including selling assets and paying creditors' claims. See 12 U.S.C. §1821(d); Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 2 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion). FDIC-Corporate functions as an insurer of bank deposits, and is charged with paying the insured deposits of failed banks within a reasonable time. See 12 U.S.C. §1821(a); Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 2 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion).

Only FDIC--Receiver intervened in DeCell's state court lawsuit against Guaranty. As a wholly distinct entity, there was no need for FDIC--Receiver to

expressly designate itself as separate from FDIC--Corporate; mere designation of the Receiver status in the pleadings was enough. No lack of capacity allegations or special appearance motions were needed. Only FDIC--Receiver intervened, and because FDIC--receiver has no authority to make deposit insurance determinations, FDIC--Corporate did not waive its statutory right to require presentation of a deposit insurance claim. See Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 6-7 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion) (noting that even though FDIC--receiver was aware of a claim for payment of a letter of credit, the court lacked jurisdiction because a claim had not been submitted to FDIC--Corporate for payment of an

insured deposit). As the FDIC noted in its brief, "DeCell simply failed to sue the correct party, FDIC Corporate, on its claim for deposit insurance and neglected to file a claim for deposit insurance with FDIC Corporate."

A review of the record strengthens the conclusion that the exhaustion requirement has not been waived. After a thorough examination of the pleadings, we find that the FDIC originally intervened solely as FDIC--Receiver. The pleadings, in both the captions and the substance, denominate that the FDIC was appearing in its receivership capacity. In fact, the Magistrate granted DeCell permission to amend its complaint to include FDIC--Corporate in a November 18, 1992 order--more than three years after

FDIC--Receiver had intervened as defendant on November 14, 1989. We agree with the district court's conclusion that "(t)he notice of removal and the intervenor's amended answer make it abundantly clear . . . that there was only one intervenor, FDIC--receiver." thus, we disagree with DeCell's assertion that FDIC--Corporate was a party to this litigation from the beginning.[6]

---

[6] DeCell's contention that FDIC--Corporate must have intervened because only FDIC--Corporate could have removed under 12 U.S.C. §1819 is also unpersuasive. Although §1819(b)(2)(B) allows for removal, removal is not proper when: 1) the FDIC is a party to the lawsuit, other than as a plaintiff, in its capacity as Receiver of a state bank, and designated as the Receiver by the exclusive appointment of State authorities; 2) the lawsuit involves only the rights or obligations of depositors and the bank itself; and 3) the lawsuit only involves the interpretation of state law. See 12 U.S.C. §1819(b)(2)(D). DeCell argues that these three conditions are met in this case; thus, because removal was allowed, it must have been undertaken by FDIC--Corporate, as FDIC-

(Cont'd)

In addition, the record clearly demonstrates that FDIC--Receiver and FDIC--Corporate timely raised their jurisdictional challenges as soon as they became aware that DeCell was claiming the letter of credit as an "insured deposit." Initially, DeCell's actions were only against Guaranty and JRL, as the original petition and the first amended original petition did not make an insurance deposit claim. After the intervention of FDIC--receiver, DeCell's lawsuit was viewed

---

(Cont'd)
-Receiver would have been statutorily precluded from removing.

Unfortunately for DeCell, the Magistrate allowed FDIC--Receiver to remove because "the FDIC has been given latitude in circumventing subparagraph (D) exceptions," and because federal issues were involved in the lawsuit. We agree with these conclusions. Thus, DeCell cannot assert that the mere act of removal was proof that FDIC--Corporate was involved in the lawsuit at that time.

"as a claim against the receivership estate," rather than as a claim for deposit insurance. Therefore, FDIC--Receiver appropriately asserted in its answer that DeCell was an unsecured creditor entitled only to a pro rata asset distribution, if entitled to any recovery at all.

Our review of the record indicates that DeCell's first assertion that it was an insured depositor was in pre-trial proceedings in October of 1991. As soon as this deposit insurance claim was made, FDIC--Receiver filed a Memorandum of Authorities contending that DeCell had not raised an insured deposit claim in its pleadings, that the district court had no jurisdiction over insured deposit claims, and that FDIC--Corporate was the proper party to be sued. Moreover, as

soon as FDIC--Corporate was joined as a defendant, it too raised the same jurisdictional and exhaustion defenses. Simply put, there is nothing in the record to indicate that FDIC--Corporate was present in the lawsuit from the initial intervention, nor does the record indicate that FDIC--Corporate waived its right to require submission of a deposit insurance claim.

Finally, any assertion that the FDIC's alleged waiver allowed the district court to exercise jurisdiction is wholly without merit. As mentioned, even if we assume that FDIC--Corporate waived its statutory right to make a "final determination," §1821(f)(4) clearly provides for review only in the circuit courts of appeal, not in the district courts. Inasmuch as DeCell is making a

subject matter jurisdiction argument, the law is clear that subject matter jurisdiction cannot be waived. See Warren v. United States, 874 F.2d 280, 281-82 (5th Cir.1989); Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n. 6 (5th Cir.1989).

C. District Court Designation Under §1821(f)(3)(B)

DeCell also contends "that by removing the case, then failing to object to the pendency of DeCell's request for deposit insurance for almost 2 years, FDIC had made a de facto designation of the district court to hear the case." DeCell relies on the language of §1821(f)(3)(B) which notes that "the Corporation may require the final determination of a court of competent jurisdiction before paying any such

claim." For many of the reasons already discussed, this contention is without merit.

First, as mentioned, both FDIC--Receiver and FDIC--Corporate made timely jurisdictional objections to DeCell's failure to file a deposit insurance claim with FDIC—Corporate. Contrary to DeCell's assertion that two years had passed before and objection was made, our review of the record indicates that jurisdictional objections were made as soon as DeCell first claimed to be an insured depositor. Neither FDIC--Receiver nor FDIC--Corporate invoked §1821(f)(3)(B) in any other manner.

Second, FDIC--Receiver's removal to federal court cannot be construed as a de facto designation of district court jurisdiction over FDIC--Corporate. As

discussed, FDIC--Receiver and FDIC--Corporate are wholly separate entities with wholly separate functions. Moreover, we have previously held that "removing a suit instigated by [the plaintiff] to federal court is not the functional equivalent of voluntarily requesting judicial determination under §1821(f)(3)(B)." Aztec General Agency v. Federal Deposit Ins. Corp., No. 93-1424, slip op. at 7 n. 5 (5th Cir. Feb. 7, 1994) (per curiam) (unpublished opinion). In short, DeCell's de facto designation argument is not supported by the facts or the law.

D. Due Process

It is undisputed that FDIC--Corporate has not promulgated regulations establishing procedures for resolving deposit insurance claims. DeCell contends

that requiring the formal submission of a deposit insurance claim to FDIC's administrative process--a process with admittedly no regulations--amounts "to an unconstitutional denial of due process and a taking of private property for public use without just compensation."

At best, however, DeCell's position is premature. As an initial matter, the statutory language of §1821(f) clearly states that the promulgation of regulations is not mandatory. Section 1821(f)(3)(A) provides that in the case of disputed deposit insurance claims, "the Corporation <u>may</u> resolve such disputed claim in accordance with regulations prescribed by the Corporation establishing procedures for resolving such claims" (emphasis added). Similarly, §1821(f)(3)(B) begins "[i]f the

Corporation has not prescribed regulations establishing procedures for resolving disputed claims. . .' Thus, the statutory language contemplates that formal regulations might not be prescribed.]

Second, our cases have previously found that the deposit insurance claims process can withstand constitutional scrutiny. See Kershaw v. Resolution Trust Corp., 975 F.2d 240, 247-48 (5th Cir.1992). In Nimon, the petitioners claimed that their due process rights were violated in a deposit insurance dispute because the Resolution Trust Corporation ('RTC') failed to prescribe formal procedural rules; instead, the petitioner's claim was handled through informal procedures. See Nimon, 975 F.2d at 247. Although we acknowledged that RTC's decision 'affects a property right

of the [plaintiffs], implicating the [D]ue [P]rocess [C]lause of the U.S. Constitution," Id, we found no due process violation, even though we explicitly noted that the "RTC has no regulations formalizing insurance dispute resolution," and the "FIRREA does not require FDIC to prescribe regulations governing the resolution of these disputes." Id. at 247-48.

In Nimon, however, we did examine whether the RTC's informal procedures satisfied the demands of due process. See id. at 247. As we noted:

> We make three inquiries in determining the requirements of due process in a particular case: (1) the private interests that will be affected by the agency's action; (2) the procedures used and the reduction

> of that risk through additional or substitute procedures; and (3) the interests of the government, including the burden that would be imposed by additional or substituted procedures.

Id. (quoting Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)) (emphasis added). In the present case, DeCell has not submitted a formal deposit insurance claim to FDIC-Corporate; thus, the administrative procedures, formal or informal, have not been invoked. We cannot entertain a due process claim in this particular case because we have no informal procedures to evaluate under the Mathews framework; simply put, DeCell's due process claim is premature because no claim has been submitted for FDIC--Corporate's

determination. Cf. Metro County Title, Inc. v. Federal Deposit Ins. Corp. 13 F.3d 883, 887-88 (5th Cir.1994) (finding no due process violation after evaluating the FDIC's informal handling of a claim under the Mathews framework). With respect to both formal and informal procedures in this case, we cannot find a violation of DeCell's due process rights.[7]

---

[7] DeCell's reliance on the Supreme Court's decision in Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp. ("FSLIC"), 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), does not further its argument. In Coit, the Supreme Court held that Coit was not required to exhaust the administrative procedures of the FSLIC because they were "inadequate." See Id. at 586. 109 S.Ct. at 1375 ("Under the current regulations, . . . no time limit is established for FSLIC's consideration of those claims retained for further review."). In addition, the Court observed that Coit's claim had been under consideration for thirteen months, yet the FSLIC had still not made a determination. See Id.

(Cont'd)

E. "Informal" Proof of Claim

Even though DeCell admits in its brief that it "did not file any proof of claim with FDIC at any time," DeCell argues that its suit against Guaranty sufficed as an informal proof of claim to invoke FDIC--Corporate's administrative

---

(Cont'd)

In Coit, however, these facts led the Supreme Court to waive the exhaustion requirement; a due process violation was neither mentioned nor addressed by the Court. Moreover, unlike the FSLIC regulation that was facially inadequate in Coit, FDIC--Corporate has no formal regulations regarding the time periods for consideration of claims. Similarly, in contrast to Coit's submission of its claim to the FSLIC, DeCell has not yet submitted its claim to FDIC--Corporate; thus we cannot evaluate whether the informal procedures used by FDIC--Corporate are "inadequate." Finally, we have previously affirmed the deposit insurance exhaustion requirement. See Aztec General Agency v. Federal Deposit Ins. Corp. No. 93-1424, slip op. at 6-7 (5th Cir. Feb 7, 1994) (per curiam) (unpublished opinion), and even if we were to waive it, §1821(f) does not provide for review in the district courts.

procedures. For a number of reasons, we find this argument unpersuasive.

First, as mentioned, only FDIC--Receiver initially substituted for Guaranty, and at that time, DeCell's petition did not make a deposit insurance claim. Thus, DeCell's lawsuit against Guaranty failed to provide notice that the §1821(f) deposit insurance procedures were applicable. Second, even if the lawsuit did provide notice of a deposit insurance claim, only FDIC--Receiver would have had that notice. FDIC--Corporate, the entity responsible for handling the deposit insurance claims, was not joined in the lawsuit until a later time. Finally, even if we assume (without deciding) that an "informal proof of claim" is legitimate, the district court would still not have jurisdiction;

first, because FDIC--Corporate has yet to make a "final determination," and second, because §1821(f)(4) provides for review only in the circuit courts of appeal. Based on this analysis, the "informal proof of claim" argument is not helpful to DeCell.

## IV. CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing DeCell's claims against FDIC--Receiver and FDIC--Corporate for lack of jurisdiction is AFFIRMED.

**APPENDIX B - FIFTH CIRCUIT ORDER**

DECELL & ASSOCIATES, INC.

Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Guaranty Bank, et al., Defendants, Federal Deposit Insurance Corporation, as Receiver for Guaranty Bank, Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

**ON PETITION FOR REHEARING**

(December 2, 1994)

Before KING, JOLLY and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cause is denied.

ENTERED FOR THE COURT:

/s Carolyn Denien King

United States Circuit Judge

**APPENDIX C - DISTRICT COURT ORDER**

DECELL & ASSOCIATES, INC.

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF GUARANTY BANK, FEDERAL DEPOSIT INSURANCE CORPORATION, AND JRL INTERNATIONAL AND ASSOCIATES, INC., Defendants

CIVIL ACTION NO. H-89-4164

ORDER DISMISSING CLAIMS AGAINST THE FDIC FOR LACK OF JURISDICTION

The above referenced action arose out of an alleged wrongful dishonor by Guaranty Bank of an irrevocable letter of credit.

Defendant JRL International and Associates, Inc. ("JRL") ordered drill collar bits from Plaintiff DeCell and

Associates, Inc. ("DeCell"), and then sold and shipped them to a Mexican company, Perforaciones Marinas Del Golfo, S.A. ("Permargo"). In response to a demand by DeCell, Guaranty Bank ("the Bank") issued an irrevocable letter of credit in the sum of up to $250,000.00 in favor of JRL on the account of Permargo. that letter of credit was allegedly transferred by JRL to assignee DeCell in the amount of $199,839.97, drawn against the letter of credit. On June 13, 1986 the Bank refused to make payment and sent a letter to DeCell Stating that the transfer was not valid.

DeCell then filed suit in state court against the Bank and JRL. When the Bank failed, the Federal Deposit Insurance Corporation, appointed as

Receiver on June 3, 1988 by the Banking Commissioner of Texas, timely removed this case to federal court under 12 U.S.C. §1819 and intervened as a defendant in place of the Bank. In its amended answer the Receiver raised various affirmative defenses, including two exclusive to the agency: the federal Court's lack of jurisdiction to determine whether the letter of credit allegedly assigned to DeCell was an "insured deposit" and DeCell's failure to sue the correct party, i.e., the FDIC in its corporate capacity ("FDIC Corporate"), which alone is authorized to pay insured deposits upon the closing of an insured depository institution, under 11 U.S.C. §1821(f)(1).

On February 7, 1992 DeCell and JRL filed a stipulation for entry of judgment

against JRL in favor of DeCell for $125,000.00 and costs of court, to be entered at the time of final judgment in this case.

Pursuant to consent of all parties, the case was tried to the bench by United States Magistrate Judge Frances Stacy. Subsequently, without issuing a judgment, the magistrate sua sponte ordered a new trial because she determined that FDIC Corporate was an indispensable party that had not been joined despite the Receiver's early attempt to convince the Court that it was not the proper party.

The Receiver filed a motion for reconsideration of the magistrate's order, urging inter alia that DeCell is statutorily required to file a claim with the FDIC Corporate, would then receive

a final determination by the agency on its insured deposit claim, and subsequently, if dissatisfied, is empowered to appeal solely to the Fifth Circuit Court of Appeals, pursuant to section 1821(f)(4). It is uncontested that DeCell never filed such a claim with the agency. The Receiver insisted that without a final agency determination, no court, including the Fifth Circuit, has jurisdiction to hear the dispute.[8] The magistrate denied the motion for reconsideration and set the case for a new trial.

The Receiver then filed a second supplemental motion for reconsideration

---

[8] The Receiver points out that even after finally being added as a party here, the FDIC Corporate could have but did not file suit in the district court to review the insured deposit claim under 1821(f)(3)(B).

of order for new trial, reiterating its jurisdictional challenge and citing a new appellate opinion, Nimon v. RTC, 975 F.2d 240 (5th Cir. 1992)(final determination of an insured deposit dispute is a procedural requirement to judicial review and only an appellate court has jurisdiction to review the FDIC's final determination). The FDIC in its corporate capacity moved to dismiss for the same reason and also withdrew its consent to proceed before the magistrate. This Court subsequently ordered the parties to file cross motions for summary judgment on the issues in the case, and denied the motion to dismiss without prejudice but granted them leave to reurge it after the Court ruled on the motions for summary judgment.

At docket call on November 5, 1993, counsel in the above referenced case indicated to the Court that they though the case could be resolved by the Court on the record without the second trial ordered by the magistrate.

In carefully reviewing the entire record, the Court recognized that something went awry in the rulings in this dispute, perhaps because in its early stages the applicable law was new, untested, and indeed, still developing. Nevertheless it is now clear to the Court that under the applicable law, cited by the FDIC in both its receivership and corporate capacities, that DeCell is required to file a claim with the federal agency and that this Court has no jurisdiction to consider the dispute.

Nimon, 975 F.2d 240. See also Kershaw v. RTC, 987 F.2d 1206 (5th Cir. 1993) and Palermo v. FDIC, 981 F.2d 843 (5th Cir. 1993)(Fifth Circuit has original jurisdiction pursuant to 12 U.S.C. §1821(f)(4) for review of final agency decisions pertaining to deposit insurance.

Accordingly the Court

ORDERS that DeCell's claims against the FDIC in both its receivership and corporate capacities are DISMISSED without prejudice for lack of jurisdiction. The Court will enter a final judgment on the claims against JRL by separate order. All pending motions are moot.

Signed this 4th day of January, 1994 at Houston, Texas.

s/MELINDA HARMON

UNITED STATES DISTRICT COURT

(2)

No. 94-1457

Supreme Court, U.S.
FILED
MAY 10 1995
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

DECELL & ASSOCIATES, INC., PETITIONER

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

---

DREW S. DAYS, III
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

WILLIAM F. KROENER, III
*General Counsel*

ANN S. DUROSS
*Assistant General Counsel*

ROBERT D. MCGILLICUDDY
JEANNETTE E. ROACH
*Counsel*
*Federal Deposit Insurance Corporation*
*Washington, D.C. 20429*

18 pp

## QUESTIONS PRESENTED

1. Whether the district court was correct in dismissing petitioner's suit against the Federal Deposit Insurance Corporation (FDIC) for deposit insurance on the ground that petitioner had failed first to present that claim for resolution to the FDIC in its corporate capacity, as insurer of deposits.

2. Whether, by intervening in a state court lawsuit brought against a failed bank by an assignee of a dishonored letter of credit and removing that suit to federal court, the FDIC, in its capacity as receiver for the failed bank, waived the requirement that the assignee file a proof of claim with the FDIC in its corporate capacity.

3. Whether petitioner's due process challenge to the FDIC's informal deposit insurance claim resolution procedures was premature, in light of the fact that petitioner had not yet availed itself of those procedures.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Abramovitz* v. *FDIC*, No. 93-2646 (4th Cir. May 12, 1994) | 8 |
| *Abrams* v. *FDIC*, 938 F.2d 22 (2d Cir. 1991) | 8 |
| *Aztec General Agency* v. *FDIC*, No. 93-1424 (5th Cir. Feb. 7, 1994) | 4, 5 |
| *Callejo* v. *RTC*, 17 F.3d 1497 (D.C. Cir. 1994) | 8 |
| *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989) | 12, 13 |
| *FDIC* v. *Bernstein*, 944 F.2d 101 (2d Cir. 1991) | 9 |
| *FDIC* v. *Condit*, 861 F.2d 853 (5th Cir. 1988) | 5, 9 |
| *FDIC* v. *McClanahan*, 795 F.2d 512 (5th Cir. 1986) | 9 |
| *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) | 10 |
| *Gunter* v. *Hutcheson*, 674 F.2d 862 (11th Cir.), cert. denied, 459 U.S. 826 (1982) | 9 |
| *Kershaw* v. *RTC*, 987 F.2d 1206 (5th Cir. 1993) | 4, 6, 7 |
| *Massachusetts* v. *FDIC*, 47 F.3d 456 (1st Cir. 1995) | 8 |
| *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) | 12 |
| *Nimon* v. *RTC*, 975 F.2d 240 (5th Cir. 1992) | 4, 6, 8 |
| *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988) | 12 |
| *Sekula* v. *FDIC*, No. 92-3263 (3d Cir. Jan. 12, 1993) | 8 |
| *Texas Am. Bancshares, Inc.* v. *Clarke*, 954 F.2d 329 (5th Cir. 1992) | 5 |

Cases—Continued: Page

*Treasurer of Laramie County* v. *FDIC*, No. 90-9549 (10th Cir. Apr. 18, 1991) ..... 8
*United States* v. *Gaubert*, 499 U.S. 315 (1991) ..... 13
*Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985) ..... 12

Statutes:

5 U.S.C. 706(1) ..... 13
12 U.S.C. 1818 (Supp. V 1993) ..... 10
12 U.S.C. 1819 (Supp. V 1993) ..... 5
12 U.S.C. 1819(b)(2)(B) (Supp. V 1993) ..... 2-3, 11
12 U.S.C. 1819(b)(2)(D) (Supp. V 1993) ..... 11
12 U.S.C. 1821(a) (Supp. V 1993) ..... 10
12 U.S.C. 1821(d) (Supp. V 1993) ..... 10
12 U.S.C. 1821(d)(2) (Supp. V 1993) ..... 10
12 U.S.C. 1821(f) (Supp. V 1993) ..... 6, 7, 8
12 U.S.C. 1821(f)(1) (Supp. V 1993) ..... 6, 7, 10
12 U.S.C. 1821(f)(2) (Supp. V 1993) ..... 7, 10
12 U.S.C. 1821(f)(3)(A) (Supp. V 1993) ..... 7, 8
12 U.S.C. 1821(f)(3)(B) (Supp. V 1993) ..... 7, 8, 13
12 U.S.C. 1821(f)(4) (Supp. V 1993) ..... 7, 10
12 U.S.C. 1821(i)(2) (Supp. V 1993) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-1457

DECELL & ASSOCIATES, INC., PETITIONER

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 36 F.3d 464. The opinion of the district court (Pet. App. 42a-49a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 1, 1994. A petition for rehearing was denied on December 2, 1994. Pet. App. 40a-41a. The petition for a writ of certiorari was filed on March 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is in the business of buying and selling oil field drill pipe and related products. In April, 1986, JRL International and Associates (JRL) ordered drill collar bits from petitioner, instructing petitioner to ship the bits to a Mexican company, Perforaciones Marinas Del Golfo, S.A. (Permargo). Before it would act on that order, petitioner required a letter of credit. Accordingly, on March 24, 1986, Guaranty Bank, a state-chartered bank located in Dallas, Texas, issued a $250,000 standby letter of credit on the account of Permargo in favor of JRL. After JRL endorsed the letter of credit over to petitioner, petitioner shipped the drill collar bits to Permargo. When petitioner presented the letter of credit to Guaranty, however, Guaranty refused to make payment, stating that the assignment from JRL to petitioner was invalid. Pet. App. 2a-3a, 42a-43a.

2. On August 13, 1986, petitioner filed suit in state court against JRL and Guaranty, claiming that Guaranty was liable for wrongfully failing to honor the letter of credit.[1] On June 3, 1988, while the case was pending in state court, Guaranty failed, and the Banking Commissioner of Texas appointed the Federal Deposit Insurance Corporation (FDIC) as receiver (FDIC-Receiver). FDIC-Receiver intervened as a defendant in the state court action in place of Guaranty, and removed the case to federal district court under 12 U.S.C. 1819(b)(2)(B) (Supp. V

[1] On February 7, 1992, petitioner and JRL filed a stipulation for entry of judgment against JRL in favor of petitioner. The action then proceeded against FDIC-Receiver on petitioner's wrongful dishonor claim. Pet. App. 5a.

1993). Pet. App. 3a-4a. In its answer to petitioner's complaint, FDIC-Receiver asserted, among other things, that any recovery against the receivership estate on the basis of the standby letter of credit was limited to a pro rata distribution of the remaining assets of the estate, if any. *Id.* at 26a.

In pre-trial proceedings in October, 1991, petitioner asserted for the first time that it was an insured depositor with respect to the letter of credit. Pet. App. 26a. FDIC-Receiver argued in response (1) that petitioner had not raised a deposit insurance claim in its pleadings, (2) that the district court had no subject matter jurisdiction over the deposit insurance claim, and (3) that FDIC-Receiver was not a proper defendant with respect to the deposit insurance claim, because the FDIC is authorized to make payment on such claims only in its corporate capacity. *Ibid.* See also *id.* at 4a-5a.

Following a bench trial on whether Guaranty had improperly failed to honor the standby letter of credit, but prior to judgment, the presiding magistrate judge sua sponte ordered a new trial and required petitioner to amend its pleadings to join FDIC-Corporate, based on her determination that FDIC-Corporate was an indispensable party to petitioner's claim for deposit insurance. The magistrate judge ruled, however, that the district court did have subject matter jurisdiction to determine whether the letter of credit was an insured deposit. Pet. App. 6a.

FDIC-Receiver filed a motion for reconsideration, arguing that no court has jurisdiction over a deposit insurance claim until the party making the claim for deposit insurance has filed a claim with FDIC-Corporate, and FDIC-Corporate has made a final determination not to pay in full the amount claimed.

Pet. App. 6a. After the magistrate judge denied that motion, FDIC-Receiver filed a supplemental motion for reconsideration. FDIC-Corporate (which had by then been joined by petitioner as a party defendant) moved to dismiss on the same jurisdictional grounds, and withdrew its consent to proceed before the magistrate judge. *Id.* at 6a-7a. At that point, the district court ordered the parties to file cross-motions for summary judgment. *Id.* at 7a.

On January 4, 1994, the district court dismissed petitioner's claims against FDIC-Receiver and FDIC-Corporate for lack of subject matter jurisdiction. The court concluded that petitioner was required first to file a claim for deposit insurance with FDIC-Corporate, and that jurisdiction to review FDIC-Corporate's determination would reside solely in the court of appeals. Pet. App. 7a-8a, 48a-49a.

3. The court of appeals affirmed. Pet. App. 1a-39a. Noting petitioner's concession that it had never presented a deposit insurance claim to FDIC-Corporate, the court found that FDIC-Corporate had been afforded no opportunity to make a "final determination" on the status of petitioner's standby letter of credit as an insured deposit, and concluded for that reason that the case was not yet ripe for judicial review. *Id.* at 16a, citing *Aztec General Agency* v. *FDIC*, No. 93-1424 (5th Cir. Feb. 7, 1994), slip op. 6. Moreover, the court held that even if petitioner had made a claim against FDIC-Corporate, and FDIC-Corporate had made a final determination denying coverage, review would lie in the court of appeals, not in the district court. Pet. App. 16a-18a, citing *Aztec*, slip op. 7; *Kershaw* v. *RTC*, 987 F.2d 1206, 1208 (5th Cir. 1993); *Nimon* v. *RTC*, 975 F.2d 240, 243-244 (5th Cir. 1992).

The court of appeals rejected petitioner's argument that when FDIC-Receiver intervened in the state court lawsuit without expressly limiting its appearance to that of receiver, it waived FDIC-Corporate's right to argue that it had never been presented with, and that it was unaware of, the deposit insurance claim. Pet. App. 18a-27a. The court held that there was no need for FDIC-Receiver expressly to designate itself as separate from FDIC-Corporate, because the FDIC operates in two separate and legally distinct capacities, each with very different responsibilities. *Id.* at 20a-23a, citing *Aztec*, slip op. 2, n.1 ("FDIC-Receiver and FDIC-Corporate are distinct legal entities."); *Texas Am. Bancshares, Inc.* v. *Clarke*, 954 F.2d 329, 335 (5th Cir. 1992) ("The separateness of these dual identities of the FDIC has been well respected by federal courts."); *FDIC* v. *Condit*, 861 F.2d 853, 854, 857 (5th Cir. 1988) (FDIC wears two "hats" and it is the burden of the litigants to define their adversaries). Because FDIC-Receiver and FDIC-Corporate are distinct legal entities, the court concluded that FDIC-Receiver's intervention (in pleadings that made clear its receiver status)[2] could not be interpreted as a waiver by FDIC-Corporate of its right to require presentation of the deposit insurance claim. *Ibid.*

---

[2] The court also disagreed with petitioner's argument that FDIC-Corporate must have intervened because only FDIC-Corporate could have removed the case to federal district court under Section 1819. Pet. App. 24a n.6. Although the court acknowledged that in some circumstances FDIC-Receiver is not permitted to remove, the court found removal by FDIC-Receiver proper in this case because of the federal issues raised by petitioner's suit. *Id.* at 25a n.6.

The court of appeals found equally unavailing petitioner's argument that FDIC-Corporate had waived its right to insist upon presentation of a deposit insurance claim because it failed to raise that objection in a timely manner. The record made clear, in the court's view, that both FDIC-Receiver and FDIC-Corporate raised their jurisdictional challenges as soon as petitioner raised his claim that the letter of credit was an insured deposit. Pet. App. 25a-26a. Moreover, because FDIC-Corporate steadfastly disputed the district court's jurisdiction, the court rejected petitioner's contention that the FDIC had effectively designated the district court to resolve the deposit insurance claim. *Id.* at 29a-30a.

Finally, the court rejected as premature petitioner's argument that the FDIC's informal claims resolution process violated petitioner's right to procedural due process. Pet. App. 31a-38a. The court noted that the Fifth Circuit had previously upheld the constitutional sufficiency of the claims procedures used by FDIC-Corporate, *id.* at 32a-34a, citing *Kershaw*, 987 F.2d at 1210; *Nimon*, 975 F.2d at 247-248, but found that, in light of the informality of the FDIC's procedures, the adequacy of the process afforded any particular claimant cannot be determined until after those procedures have been invoked, Pet. App. 34a-35a.

## ARGUMENT

1. Section 1821(f) of Title 12 of the United States Code governs the process by which the FDIC determines which claims are entitled to federal deposit insurance. Section 1821(f)(1) provides that, upon the liquidation, closing, or winding up of the

affairs of an insured depository institution, the FDIC, in its corporate capacity, "shall" make payment of the insured deposits "as soon as possible." 12 U.S.C. 1821(f)(1) (Supp. V 1993). Although "[t]he [FDIC], in its discretion, may require proof of claims to be filed," 12 U.S.C. 1821(f)(2) (Supp. V 1993), in the ordinary course the FDIC reviews a failed bank's accounts and notifies account holders sua sponte of its deposit insurance determinations. When the bank's records do not provide notice of a potential claim, however, the claimant must file a proof of claim to put the FDIC on notice and to permit the FDIC to make a payment determination.

Section 1821(f) also sets forth a framework for the resolution of disputes. The FDIC may resolve disputed claims "in accordance with regulations prescribed by the [FDIC] establishing procedures for resolving such claims." 12 U.S.C. 1821(f)(3)(A) (Supp. V 1993). In the alternative, "if the [FDIC] has not prescribed regulations establishing procedures for resolving disputed claims, the [FDIC] may require the final determination of a court of competent jurisdiction before paying any such claim." 12 U.S.C. 1821(f)(3)(B) (Supp. V 1993).[3] That

[3] The court below held that even if FDIC-Corporate had rejected a properly filed proof of claim for deposit insurance, petitioner could not obtain review of that decision in district court, but could instead seek review only in the court of appeals. That holding was consistent with the Fifth Circuit's view that the FDIC may finally resolve deposit insurance claims under Section 1821(f)(3)(A) even if it has not promulgated procedural regulations to guide its claims resolution process, and that review of the FDIC's final determinations lies exclusively in the courts of appeals under 12 U.S.C. 1821(f)(4) (Supp. V 1993). See *Kershaw*, 987 F.2d at 1208;

framework for dispute resolution comes into play only when there is a live dispute respecting payment of a claim. For there to be a dispute, the FDIC must have made a determination not to pay the amount desired by the claimant. Here, because petitioner

---

*Nimon*, 975 F.2d at 243-244; accord *Abrams* v. *FDIC*, 938 F.2d 22, 24-25 (2d Cir. 1991).

The District of Columbia Circuit and the First Circuit (and the Third, Fourth, and Tenth Circuits in unpublished dispositions) have taken a contrary view. In their view, Section 1821(f) gives the FDIC a binary choice: It may promulgate regulations establishing procedures for administrative resolution of disputed claims and, under Section 1821(f)(3)(A), resolve deposit insurance disputes in accordance with those procedures, subject to appellate review; alternatively, if the FDIC has promulgated no regulations, it must submit disputed claims for resolution to "courts of competent jurisdiction" (*i.e.*, district courts), under Section 1821(f)(3)(B). See *Callejo* v. *RTC*, 17 F.3d 1497, 1499-1500 (D.C. Cir. 1994); *Massachusetts* v. *FDIC*, 47 F.3d 456, 457-458 (1st Cir. 1995); *Sekula* v. *FDIC*, No. 92-3263 (3d Cir. Jan. 12, 1993) (unpublished order transferring case to district court); *Abramovitz* v. *FDIC*, No. 93-2646 (4th Cir. May 12, 1994) (unpublished order transferring case to district court); *Treasurer of Laramie County* v. *FDIC*, No. 90-9549 (10th Cir. Apr. 18, 1991) (unpublished order transferring case to district court).

Both the FDIC and the Resolution Trust Corporation agree with the latter view and believe that, in the absence of regulations establishing administrative claims procedures, jurisdiction to resolve deposit insurance disputes resides in the district courts. The FDIC thus disagrees with the holding below that, even if FDIC-Corporate had finally rejected petitioner's claim, the district court would still have lacked subject matter jurisdiction. Petitioner, however, has not challenged that alternative holding. Petitioner's argument that FDIC-Corporate waived the right to require presentment of the deposit insurance claim would therefore not be sufficient, even if accepted, to warrant a reversal of the judgment of the court of appeals.

filed no proof of claim, FDIC-Corporate has made no determination whether petitioner should receive an insurance payment, and there is not yet any cognizable dispute.

Petitioner does not contest that claimants are required under the statute to file claims for deposit insurance with FDIC-Corporate. Moreover, petitioner concedes (Pet. 12) that, in this case, it did not file such a claim. Petitioner argues (Pet. 16-22), however, that under the facts of this case FDIC-Corporate should be deemed to have waived presentment. That argument is based on a misapprehension of both the applicable law and the facts of record.

a. Petitioner asserts (Pet. 21-25) that FDIC-Receiver entered a "general appearance" in state court and thereby waived any right that FDIC-Corporate might otherwise have had to object that it was neither presented with, nor otherwise made aware of, petitioner's purported deposit insurance claim. Contrary to petitioner's contention, however, the pleadings demonstrate that the FDIC entered its appearance in this case solely in its capacity as receiver for Guaranty. Pet. App. 23a-24a. As the district court correctly found, FDIC-Receiver's notice of removal and its amended answer made it "abundantly clear" that FDIC-Corporate never intervened, and that the FDIC was a party only in its receivership capacity. *Id.* at 24a.

It is well settled that the FDIC operates in two separate, legally distinct capacities.[4] In its corporate

---

[4] See, *e.g.*, *FDIC* v. *Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991); *FDIC* v. *Condit*, 861 F.2d at 854; *FDIC* v. *McClanahan*, 795 F.2d 512, 516 (5th Cir. 1986); *Gunter* v. *Hutcheson*, 674 F.2d 862, 865 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

capacity, the FDIC functions as a bank regulator and insurer of bank deposits. 12 U.S.C. 1818, 1821(a) (Supp. V 1993). In that capacity, it has the authority to pay insured deposits (12 U.S.C. 1821(f)(1) (Supp. V 1993)), require proof of claims (12 U.S.C. 1821(f)(2) (Supp. V (1993)), and make final determinations respecting insurance coverage (12 U.S.C. 1821(f)(4) (Supp. V 1993)). When the FDIC acts as receiver, on the other hand, it represents a failed bank's estate and all of its component interests (creditors, depositors, and shareholders). 12 U.S.C. 1821(d) (Supp. V 1993). Like a trustee in bankruptcy, FDIC-Receiver administers only the assets of the receivership estate. 12 U.S.C. 1821(d)(2), 1821(i)(2) (Supp. V 1993). The FDIC in its receivership capacity therefore cannot waive rights held and exercised exclusively by FDIC-Corporate. Because FDIC-Corporate and FDIC-Receiver are distinct legal entities, it is not surprising that petitioner can cite no support for the proposition that FDIC-Corporate should be deemed to be on notice of legal claims made against FDIC-Receiver, or that FDIC-Receiver had an obligation to inform FDIC-Corporate that petitioner might later recharacterize its wrongful dishonor claim as one for deposit insurance.[5]

b. To the extent that petitioner argues (Pet. 11-12, 22) that FDIC-Corporate had actual knowledge

---

[5] The latter contention is particularly unreasonable in light of FDIC-Receiver's position in this litigation that the standby letter of credit is not an insured deposit. Cf. *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) (standby letter of credit, backed only by an unsecured promissory note, is not an insured deposit, and beneficiary is not entitled to payment in preference over other creditors of failed bank).

of petitioner's deposit insurance claim from the inception of this suit, that argument is refuted by the record. Petitioner's complaint against Guaranty, a private financial institution, did not state a deposit insurance claim. When FDIC-Receiver intervened and removed the case to federal court, it correctly interpreted the complaint to assert solely a claim for wrongful dishonor against the receivership estate.[6] It was not until the pre-trial proceedings in 1991, two years after the case had been removed, that petitioner asserted for the first time that its letter of credit was an insured deposit. FDIC-Receiver immediately objected to that claim, pointing out that petitioner could make a deposit insurance claim only against FDIC-Corporate. On being joined in the suit, FDIC-Corporate asserted that the district court lacked jurisdiction because petitioner had not yet filed a proof of claim.

2. Petitioner argues (Pet. 15, 27-31) that requiring it to submit its deposit insurance claim for ad-

---

[6] Petitioner argues (Pet. 17-18) that FDIC-Receiver has no authority to remove suits against it, and that the FDIC must therefore have intervened in the action in its corporate capacity to obtain removal. That argument is incorrect on two grounds. First, as the court of appeals explained, Pet. App. 24a n.6, FDIC-Receiver may remove if the lawsuit does not involve solely the interpretation of issues of state law. See 12 U.S.C. 1819(b)(2)(B) and (D) (Supp. V 1993). The court of appeals agreed with the magistrate judge that removal was justified in this case because petitioner's suit involved federal issues, Pet. App. 25a n.6, and petitioner has not raised in its petition for certiorari a challenge to that determination. Second, even if the magistrate judge had erred in permitting removal, that would not establish that FDIC-Corporate was involved in the lawsuit at the time of removal.

ministrative resolution in the absence of formal procedures to guide the administrative process amounts to a denial of due process. The court of appeals correctly rejected that claim as unripe. The constitutional sufficiency of the FDIC's deposit insurance claim resolution procedures is determined by reference to the framework established by *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Because the FDIC utilizes informal procedures, however, the adequacy of the process afforded in a particular case is not susceptible to ex ante review. Cf. *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988) ("Given the 'essentially ad hoc, factual inquir[y]' involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'" (citation omitted)). If petitioner remains dissatisfied after it has submitted a claim to FDIC-Corporate, the reviewing court then will have an actual record against which to judge the adequacy of the claims review process. Review prior to that time would be premature. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985) (holding claim that county unconstitutionally took property through enactment of zoning ordinance premature, because developer had not sought a variance or exhausted state procedures for obtaining just compensation).

Petitioner's reliance on *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), is misplaced. *Coit* was not decided on due process grounds. Rather, this Court held that the statutory authority of the Federal Savings and Loan Insurance Corporation

FSLIC) could not reasonably be construed to permit it to impose a strict exhaustion requirement when the FSLIC's regulations contained no time limit on the period for administrative review. *Id.* at 586-587. This case does not concern the reasonability of an agency's regulations. Here, the statute clearly permits the FDIC to forgo promulgation of procedural regulations. See 12 U.S.C. 1821(f)(3)(B) (Supp. V (1993). That option is not, on its face, violative of due process, because agencies are not required by the Constitution to act solely through regulations. Instead, they may permissibly "establish policy on a case-by-case basis * * * through administration of agency programs." *United States* v. *Gaubert*, 499 U.S. 315, 324 (1991).

Further, the Court found it relevant in *Coit* that the petitioner's claim for $113 million had been pending for 13 months, and that the FSLIC had yet to make even an initial determination. In this case, there has been no showing that the FDIC fails promptly to resolve deposit insurance claims. Unlike the petitioner in *Coit*, petitioner in the instant case has not yet submitted its claim for administrative resolution. See Pet. App. 34a-36a. If petitioner files a claim, and the FDIC fails within a reasonable time to make a determination, petitioner will have recourse to adequate administrative remedies. See 5 U.S.C. 706(1) ("[T]he reviewing court shall * * * compel agency action unlawfully withheld or unreasonably delayed.").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

WILLIAM F. KROENER, III
*General Counsel*

ANN S. DUROSS
*Assistant General Counsel*

ROBERT D. MCGILLICUDDY
JEANNETTE E. ROACH
*Counsel*
*Federal Deposit Insurance Corporation*

MAY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20071